No. 210 24

Supreme Court of the United States

OCTOBER TERM—1943

HARRY M. KOHN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

SYDNEY J. SCHWARTZ,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM—1943

HARRY M. KOHN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner, Harry M. Kohn, and respectfully petitions this Court for a writ of certiorari to review the final judgment of the Court of Appeals of the State of New York entered in this matter on April 6, 1944 (R. 246) (292 N. Y. 597). The said judgment affirmed, without opinion, a judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered in the office of the Clerk of said Court on November 19, 1943 (R. 242). The Appellate Division judgment, in turn, modified, without opinion, by remitting the fine imposed, and as so modified, affirmed a final judgment of the Court of Special Sessions of the City of New York, County of New York, entered on May 27th, 1943 in the office of the Clerk of said Court (R. 20) convicting the petitioner of the crime of sending annoying letters under Section 551 of the Penal Law of

New York State. Prosecution was by information filed by the District Attorney of New York County (R. 4). Petitioner was sentenced to six months imprisonment and to the payment of a fine of $500 (R. 20).

Summary and Short Statement of the Matter Involved

Section 551 of the Penal Law of the State of New York makes it a misdemeanor, among other things, to send or deliver or for such purpose to part with the possession of any letter, postal card or writing, with or without a name subscribed thereto, or signed with a fictitious name, "with intent thereby to cause annoyance to any person."

The petitioner is a licensed private detective (R. 34) engaged in the business of locating missing debtors for lawyers, finance companies, department stores and other clients (R. 26, 154, 235). The information charges that the defendant sent and delivered and, for such purpose, parted with the possession of six cards and a letter with intent thereby to cause annoyance to various people named in the information (R. 4, *et seq.*). Each epistle forms the basis for a separate count of the seven counts of the information. Each of the documents was sent or caused to be sent by petitioner as a decoy card or letter, for the purpose of having the recipient call petitioner by telephone and engage in conversation with petitioner, in order to enable petitioner to ascertain the address or whereabouts of various missing debtors that he was trying to locate (R. 31, 91, 155).

Petitioner was tried before a Court consisting of three justices, without a jury (R. 21). He was acquitted on the first count based upon a letter (R. 4-6) and on three counts based upon cards (R. 7, 13, 17). He was convicted upon three counts based upon substantially identical cards (R. 9, 11, 15), one conviction being by a divided

bench (R. 20). The letter and cards upon which the various counts of the information were based were forms so designed as to convey the impression that they came from a sanitarium or convalescent home. Typical of the cards is that contained in the sixth count of the information, one of those upon which the defendant was convicted (R. 15). It is reproduced as follows:

OUT-PATIENT DIVISION

OFFICE OF WARD SUPERVISOR

FOR OFFICIAL USE ONLY

FOR IDENTIFICATION REFER TO WARD

KE-88-4

IMPORTANT

PLEASE PHONE CH 4-0169 AT 1-2 P.M.

IMMEDIATELY UPON RECEIPT OF THIS CARD. (EXCEPT SATURDAY, SUNDAY OR HOLIDAYS)

ASK FOR WARD SUPERVISOR

To_____

WE ARE REQUIRED TO WITHHOLD IDENTITY OF PATIENT AND INSTITUTION UNTIL VERIFIED CONTACT IS MADE WITH PERSON ADDRESSED.

VISITING HOURS BY APPOINTMENT ONLY.

DO NOT PHONE SATURDAY, SUNDAY OR HOLIDAYS.

APPROVED BY Mild Winch

Director

The cards forming the basis for the other counts vary only in that some (not all) have the names of addresses (R. 7, 9, 11, 13, 17). There was no proof at the trial that the petitioner knew any of the persons to whom the cards were mailed, that he had any personal aminus towards any of those individuals, or that he had any malicious or wilful intent to cause wanton annoyance. The only proof of petitioner's purpose was that the cards were sent in the course of his business as a private detective locating missing debtors and that he did not

deviate from that purpose at any time (R. 112-5, 124, 142, 181-2). There was no different evidence of *intent to annoy* in sending the group of cards in respect of which petitioner was convicted from that relating to the documents forming the basis for the counts upon which he was acquitted. There was variation in the evidence of the subjective reaction of the recipients of the cards. Some were disturbed (R. 124-5, 141-2, 180) and others paid little attention to the documents (R. 119, 159, 164-5). All of the evidence of subjective reaction was objected to by petitioner at the trial (R. 122, 141, 166, 180-1).

Petitioner contends that the statute upon which he was convicted is unconstitutional, and that the conviction deprived him of property and liberty without due process of law, for the reason that the statute, upon its face and particularly in its application to petitioner in the case at bar, is so vague and indefinite that ordinary persons cannot know what standard of conduct is expected of them, in order to avoid the commission of a crime under the statute. In the case at bar, for doing precisely the same thing on seven separate occasions, petitioner has been found guilty of crime in three instances (one by a divided Court) and was found not guilty in four cases. The proof is undisputed that his purpose and intent never varied. The cards themselves are substantially identical. The only variation in the evidence was the subjective reaction of the persons who received the cards.

Petitioner further contends that the statute is unconstitutional because, as construed in this case, it attempts to legislate the creation of a new crime in a realm of conduct not within the scope of the police powers of the States. The act proscribed by the statute involves no injury or threat of injury to person or property; it does not contemplate any obscenity, defamation, threat to public morals or other type of conduct within the commonly accepted scope of police power. The statute as construed

attempts to legislate good manners or taste involving no public interest. While petitioner happens to be a private detective, the statute is not directed to control of the activity of his calling,* but governs the conduct of every person in the state, without limitation or distinction.

Jurisdiction

Jurisdiction to grant the writ prayed for by petitioner is found in Section 237 (a) of the Judicial Code (Act of Febraary 13, 1925, Chapter 229, 43 Stat. 936, 937). There is drawn in question the validity of a statute of the State of New York, to wit Section 551 of the Penal Law, on the ground of its being repugnant to the constitution of the United States, and the decision of the Court of Appeals of the State of New York, which is the highest Court of said State in which a decision in the suit could be had, is in favor of its validity. The question involved is substantial, inasmuch as petitioner was convicted of the commission of a crime. The issue involved has not been directly considered in any previous case in this Court. Other cases in this Court hereinafter referred to lead to the conclusion that the decision of the Court of Appeals is not in accord with general principles laid down by decisions of this Court.

The federal question raised in this matter and sought to be presented to this Court for review was first raised by motions to dismiss at the trial (R. 195-9, 206) which were denied (R. 205-6) and by notice of appeal to the Appellate Division (R. 2) and to the Court of Appeals (R. 241) both of which Courts affirmed the conviction (R. 242, 246).

The practice in the State of New York does not require the specification or assignment of error upon the taking

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*Private detectives were not subject to license in 1891 when the Part of Section 551 of the Penal Law here involved (Laws of 1891 c.120, § 1) was first enacted. (Laws of 1898 c.422; New York General Business Law, § 70).

of an appeal, and the notice of appeal brings up for review all questions presented by the record (Code of Criminal Procedure, §§ 522, 523). The question was directly presented to the Court of Appeals by argument to that Court in the brief submitted on behalf of petitioner, reading in part as follows:

"Unless the statute is reasonably construed so as to exclude from its ambit the necessary and incidental annoyances in the carrying on of a lawful business and those inherent in the multitude of other lawful pursuits incident to civilization, it would clearly be unconstitutional.

United States v. *Cohen Grocery Co.*, 255 U. S. 81, 89;
Stromberg v. *California*, 283 U. S. 359;
New State Ice Co. v. *Liebmann*, 250 U. S. 262, 279-280;
Herndon v. *Lowry*, 301 U. S. 242;
Lanzetta v. *New Jersey*, 306 U. S. 451;
Thornhill v. *Alabama*, 310 U. S. 88, 97-8;
Gorin v. *United States*, 312 U. S. 19, 26-7, n. 12.

"The same would be true if the test of what constitutes annoyance is the subjective reaction of the recipients of the cards (the test applied by the trial court, fols. 301, 517, 618-9, 644-7).

"In *Lanzetta* v. *New Jersey*, *supra*, the Court stated, at page 453:

> 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Construction Co., 269 U. S. 385, 391: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its pen-

alties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'"

"In *Stromberg* v. *California*, *supra*, the Court had under consideration a statute of California making it a felony publicly to display any flag 'as a sign, symbol or emblem of opposition to organized government * * *.' The Court stated (p. 369) that the wording of the statute might be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations. It held that a statute so vague that it could be construed to include acts inherently lawful was violative of the Fourteenth Amendment and void.

"The Court there reversed a conviction under the statute notwithstanding that there was evidence in the case which might have justified a conviction under other portions of the statute not unconstitutional where the ac- cused, however, had been tried upon an indictment pleading the faulty as well as the valid parts of the statute.

"In *Smith* v. *Cahoon*, 283 U. S. 553, the Court stated (p. 564) that obligations imposed by criminal statutes must be defined with a 'fair degree of certainty'.

"In *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, the Court held unconstitutional a criminal statute construed to define real value as 'its market value under fair competition, and under normal market conditions' because the definition offered 'no standard of conduct that it is possible to know' (p. 221).

"In *Gorin* v. *United States*, *supra*, Mr. Justice Reed stated (p. 26): 'If this were the language, it would need to be tested by the inquiry as to whether it had double meaning or forced any one, at his peril, to speculate as

to whether certain actions violated the statute. This Court has frequently held criminal laws deemed to violate these tests invalid.'

"We do not cite these authorities to show that the statute in all its applications is unconstitutional. We contend that a construction which makes the test of intent to annoy the subjective reaction of the recipients of the cards destroys the degree of definiteness required of criminal statutes by the Federal Constitution.

"Section 551 of the Penal Law, as applied in the case at bar, has been given a subjective definition. Defendant's intent in mailing the cards has been ignored. He has been acquitted on four counts where there was no proof of annoyance, and he has been convicted on three counts where the Trial Court felt there was subjective annoyance notwithstanding that the cards were all identical, the surrounding circumstances were the same, and defendant's purpose and intent never varied."

If it be contended that the issue was not sufficiently clearly stated at the trial, the issue was nonetheless preserved for review by this Court.

Petitioner at the trial contended for a construction of the statute which would have excluded his conduct, as alleged in the information, from the scope of the law (R. 195-7). In doing so he was justified because the only two cases then reported which considered the statute suggested this position (*People* v. *Mikulski*, 146 N. Y. Supp. 829; *People* v. *Loveless*, 84 N. Y. Supp. 1114; neither officially reported). Having timely raised the federal question so that it was submitted to and necessarily considered by the Court of Appeals, jurisdiction to review by certiorari has been preserved in this Court. (*Missouri* v. *Gehner*, 281 U. S. 313, 320; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 678; see also dissenting opinion of Mr. Justice Cardozo in *Herndon* v. *Georgia*, 295 U. S. 441, 446-7, concurred in by Mr. Justice Brandeis and present Chief Justice Stone).

The Questions Presented

The record presents the following federal questions:—

1. Is Section 551 of the Penal Law, on its face and in its application to petitioner, unconstitutional and void as violative of the Fourteenth Amendment to the Constitution of the United States, in that it prescribes no standard of conduct to which petitioner might refer in determining whether his act in sending or causing to be sent the documents specified in the information were or were not prohibited by the statute?

2. Is Section 551 of the Penal Law, on its face and in its application to the petitioner in the case at bar, unconstitutional and void as violative of the Fourteenth Amendment to the Constitution of the United States, in that it proscribes conduct not within the proper exercise of the police powers of the State, to wit conduct consisting at worst of no more than bad taste or manners.

Reasons Relied on for the Allowance of a Writ

The reasons relied on for the allowance of a writ for certiorari herein prayed for is that the Court of Appeals of the State of New York, by its judgment sought to be reviewed, has decided a federal question of substance not heretofore determined by this Court and has decided it in a way not in accord with applicable decisions of this Court in other cases involving a similar principle.

As appears more particularly in the brief submitted herewith, this Court has repeatedly held that criminal statutes violate the Fourteenth Amendment of the United States Constitution where they prohibit conduct for which no standard is prescribed which may be reasonably determined and ascertained in advance of acting. The statute involved in the case at bar does not furnish a sufficiently ascertainable standard of guilt. Petitioner was engaged in the pursuit of a lawful occupation carry-

ing it on in a way that he had been following for years. The nature of his occupation, to wit, the detection of persons intent upon concealing their identity and whereabouts, made it necessary for him, in accordance with time-honored practice, to use methods of decoy to aid him in detection. Although the defendant did precisely the same thing on seven occasions revealed by the information, the identical act has been found to be non-criminal and lawful in four instances and has been found to violate the statute in three cases, and in one of the latter, the Court itself could not agree unanimously upon the culpability of petitioner's conduct. Obviously, if identical conduct can constitute crime one day and be lawful the next, it is not possible for an individual to know in advance what is prohibited by the statute. Particularly is this true in the case at bar where petitioner's activities were made known to the District Attorney of New York County over four years prior to the filing of any information and the greatest degree of cooperation was offered to submit petitioner's business methods to investigation (R. 234-5, 28).

The statute, on its face, proscribes conduct of the widest possible character. Hardly a human activity exists which does not occasion or cause annoyance to some one. The statute does not limit its scope to conduct which threatens injury to person, property, or public morals. No threat of injury is necessary to constitute the crime. Under the circumstances here involved and further discussed in the brief appended hereto, it is submitted that the statute goes beyond the scope of the police powers of the state and attempts to legislate in matters of taste and manners where no reasonably ascertainable standard exists or can exist in our society.

The issue involved is one of fundamental and basic importance, since the statute of New York is the only one in any of the States which attempts to castigate as criminal conduct which threatens no injury to person,

property or morals, involves no obscenity or defamation and involves in its scope nothing more than good manners. If this first attempt to control personal conduct having no proper public interest can succeed, the way will be open for legislation of the widest scope controlling every intimate detail of private life regardless of whether any public interest is threatened or involved. Under these circumstances, it seems that this case presents a question of the greatest importance which ought to be reviewed by this Court.

Conclusion

Wherefore, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding that Court to certify and to send to this Court on a designated day for its review and determination a full and complete transcript of the record and all proceedings in the action entitled: People of the State of New York, respondent, v. Harry M. Kohn, defendant-appellant, calendar #26, February, 1944 Term, and that said judgment of the Court of Appeals of the State of New York, the said judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department and the said judgment of conviction of the Court of Special Sessions of the City of New York, New York County, may be reversed by this Honorable Court, and that petitioner may be acquitted of the charges contained in the information, and have such other and further relief as in the premises may seem meet and proper.

Dated, New York City, June 29, 1944.

HARRY M. KOHN,
Petitioner.

By SYDNEY J. SCHWARTZ,
Counsel.

Supreme Court of the United States

OCTOBER TERM—1944

HARRY M. KOHN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI

Opinions Below

No opinions were rendered by the Court of Appeals, (292 N. Y. 597) or the Appellate Division (266 App. Div. 995), in this cause. The Court of Special Sessions, upon finding the defendant guilty, handed down no opinion, except that the Presiding Justice made certain oral remarks appearing at pages 206 and 207 of the record, which related to the consideration of evidence by the Court and are quoted in the appendix (*infra*, p. 25).

Jurisdiction

Jurisdiction of this Court is invoked upon the ground that there is drawn in question the validity of a statute of the State of New York, to wit, Section 551 of the

Penal Law, on the ground of its being repugnant to the Constitution of the United States, and the decision of the Court of Appeals of the State of New York, which is the highest Court of said State in which a decision in this suit could be had, is in favor of its validity. This Court's authority to grant the writ prayed for by the foregoing petition is found in Section 237(a) of the Judicial Code (Act of February 13, 1925, Chapter 229, 43 Stat. 936, 937). A discussion of the Court's jurisdiction and of the substantial nature of the question involved appears above in the petition under the heading "Jurisdiction" (p. 5) to which there is no occasion to add anything at this point.

Statement of the Case

A statement of the case is contained in the petition for certiorari, supra (p. 2) under the heading "Summary and Short Statement of the Matter Involved." It will not be here repeated.

The Statute Involved

Penal Law, § 551. *Sending threatening letters:*

> "A person who, knowing the contents thereof, sends, delivers, or in any manner causes to be sent or received any letter or other writing threatening to do any unlawful injury to the person or property of another, or *any person who shall knowingly send or deliver or shall make and for the purpose of being delivered or sent, shall part with the possession of any letter, postal card or writing with or without a name subscribed thereto or signed with a fictitious name or with any letter, mark or other designation, with intent thereby to cause annoyance to any person*, or any person who shall send, deliver, mail, or in any manner cause to be sent, delivered or mailed any paper or document simulating or intended to simulate a summons, complaint, writ or court process of any kind, is guilty of a misdemeanor."

Specification of Errors

As pointed out in the petition for certiorari supra, it is not the practice in the State of New York to assign error upon the taking of an appeal, inasmuch as the notice of appeal brings up for review the entire judgment or order appealed from. We have, in the petition for certiorari, specified the questions presented for review to this Court *supra* (p. 9). The Court of Appeals specifically committed error:

> (1) In failing to hold that Section 551 of the Penal Law, on its face and in its application to petitioner in the case at bar, is unconstitutional and void as violative of the Fourteenth Amendment to the Constitution of the United States, in that it prescribes no standard of conduct to which petitioner might refer in determining whether his act in sending or causing to be sent the documents specified in the information were or were not prohibited by the statute, and that the statute is without the scope of the police power of the state.
>
> (2) In failing to reverse the judgment of conviction of petitioner by the Court of Special Sessions of the City of New York, New York County, and the judgment of modification and affirmance thereof by the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and directing petitioner's acquittal and the dismissal of the information.

Summary of Argument

1. Section 551 of the Penal Law, in its application to petitioner in the case at bar, makes the subjective reaction of the recipients of the various decoy cards, that is,

their actual annoyance, the test of whether petitioner has committed a crime defined in the statute in substance as the sending of such cards "with intent thereby to cause annoyance."

In the majority of the counts of the information, petitioner was acquitted, although his conduct was precisely the same and his intent was exactly identical with his conduct and intent in sending the cards in respect of which he was convicted. The interpretation of the statute is such that no one in advance can know whether he is guilty of a crime in sending a letter with intent thereby to cause annoyance until and unless the letter is received and, dependent upon the personality, caprice and temporary mood of the recipient, actual annoyance results. The standard of conduct prescribed is therefore equivocal and subject to variation in each instance, so that what may constitute a crime on one occasion would be guiltless on another. The term "annoyance" itself is not defined by the statute. Its dictionary definition includes a variety of conduct from harmless teasing to less harmless, though by no means injurious vexation. Such a vague standard of conduct violates the Fourteenth Amendment to the Constitution of the United States and deprives a person convicted under such statute of his property and liberty without due process of law.

2. The statute on its face is unconstitutional and void, for the reason that it attempts to legislate in a field not within the proper province for the exercise of police powers.

The statute is not intended, and on its face, does not prohibit the doing of any act injurious to property, person or public welfare, and prescribes at most a standard of good taste or manners in which the public has no interest. It does so furthermore in a manner which prescribes no reasonable standard of conduct that may be observed by anyone, since the causing of annoyance is

so purely a matter of personal whim and reaction that each prosecution under the statute would, of necessity, be determined by the personal opinion of the triers of fact as to what does or does not constitute annoyance.

Argument

This Court has frequently had to consider the constitutionality of criminal statutes attacked because of the vague standards of guilt prescribed. In the early case of *United States* v. *Reese*, 92 U. S. 214, the Court stated, pages 219-220:

> "Laws which prohibit the doing of things, and provide a punishment for their violation, should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. * * * Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

Section 551 of the Penal Law has three distinct subdivisions, although they are not separately numbered. The first subdivision not at all here involved prohibits the delivery of a letter or writing threatening unlawful injury. The third subdivision, similarly not here involved, proscribes the delivery of papers simulating Court process. The second subdivision, which we have italicized above (p. 13), is unique in the annals of criminal legislation in that it forbids the doing of an act which threatens no injury to person or property, does not prejudice the public welfare, does not violate public

morals, contains no obscenity or defamation and does not fall within any of the well-recognized fields for exercise of the police power (*Cf. Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 415; *Seattle Trust Co.* v. *Roberge*, 278 U. S. 116; *Eubank* v. *Richmond*, 226 U. S. 137).

It is perhaps not without significance that a careful examination of the laws of the forty-eight states reveals no State other than New York which has a statute making criminal the mere sending of a letter with intent thereby to cause annoyance to any person. The statutes of all of the other states dealing with criminal communications constitute the act of sending a letter or similar document a crime only where the document is threatening, in the nature of extortion or blackmail, tends to breach the peace, or contains obscene language.*

There is only one State other than New York that uses the phrase "with intent thereby to cause annoyance to any person", and that is Michigan (Comp. laws 1929, Section 16814); but this statute specifically provides that the letter must contain "obscene language" to constitute a crime. In the case at bar, it is obvious that the cards contain no threat of injury to person or property, they contain no obscene language, they do not simulate Court process, they do not threaten extortion or blackmail, and they clearly are of such a nature that it is at least doubtful whether persons receiving the same would or would not be annoyed thereby.

The importance of the issue involved is not confined merely to the sending of decoy letters by private detectives attempting to locate missing debtors. The statute on its face is broad enough to include almost every relationship in modern society. To annoy is defined as "1.

*Some typical examples are: Code of Alabama, 1940, Title 14, § 12; Penal Code of California, 1941, § 650; Florida Statutes, 1941, § 836.10; Kentucky Revised Statutes, 1942 § 435.250; Massachusetts, Ann. Laws, C.265 § 25; Revised Statutes, Missouri, 1939, § 4634, Page's Ohio General Code, Ann., § 13385; Wisconsin, Statutes 1939, § 340.45

To be troublesome to; molest; tease; disturb; vex; weary; worry; bother; irritate. 2. To do harm to or ignore continuously or by repeated acts;" * (Funk & Wagnalls Practical Standard Dictionary, New York 1929, p. 54). Of course in the case at bar there were no repeated or continued acts, since each count of the information is based upon a single document.

It is not difficult to perceive that creditor and debtor may irritate each other; that relatives may be greatly bothered by mutual correspondence; that vexatious communication will frequently occur between merchants and their customers; that solicitations by mail often are regarded as troublesome by those approached; that individuals rejected from membership in clubs and business men blackballed by trade associations will be impelled to express their resentment by written protest; that the legion of authors of letters to the editors of our vast group of newspapers and periodicals are not predisposed to pay tribute to the sensibilities of those they criticize; that political circulars distributed and coming into the hands of members of other parties are not generally received with calm and indifference. All of these relations and a multitude of others engender annoyance and usually the communications are intended to annoy, if for no other reason than to evoke an appropriate response sought by the sender. It cannot seriously be contended that this vast, if not all-inclusive body of our citizenry

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* Extremely pertinent is the comment of the trial Court in *United States* v. *Sharp*, 27 Fed. Cas. 1041 (Approved, *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 92), where in discussing a statute making it a crime to "revolt", the Court stated (p. 1043):—

> "If we resort to definitions given by philologists, they are so multifarious, and so different, that I cannot avoid feeling a natural repugnance, to selecting from this mass of definitions, one, which may fix a crime upon these men, and that too of a capital nature; when, by making a different selection, it would be no crime at all, or certainly not the crime intended by the legislature. Laws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid."

are all law breakers or that a statute so classing them could be a lawful exercise of the police power. Annoyance is inherent in discussion, debate, solicitation and the pursuit of competitive business. It is an essential part of our system of democracy.

Unfortunately there is no decision of any Appellate Court in the State of New York construing or limiting the scope of the statute under consideration. The statute was added to the Penal Law (then Section 559 of the Penal Code) by the Laws of 1891, Chapter 120, Section 1. Research has failed to reveal any legislative documents or committee reports discussing the act.

The New York Times of February 16, 1891, page 3, column 7, notes the introduction of the bill by Senator Chase early in the then current session, but includes no comment concerning its purpose. Only three cases appear in the reports of the lower Courts in which opinions were uttered, construing or considering the act. In two of these cases (*People* v. *Mikulski*, 146 N. Y. Supp. 829 and *People* v. *Roban*, 45 N. Y. Supp. (2d) 213, neither officially reported) City Magistrates of the City of New York held that the statute, nothwithstanding its broad verbiage, was not intended to include a complaint made to the police authorities of violation of law, and that such communications were privileged. In the third case (*People* v. *Loveless*, 84 N. Y. Supp. 1114, not officially reported) the Court of Special Sessions of the City of New York, one Justice dissenting, found the Secretary of a trade association guilty where the letter involved was obviously threatening on its face.

The statute as applied by the Court of Appeals in the case at bar includes within its ambit annoyance incidental to the lawful pursuit of a licensed occupation carried on in a customary manner, and since the Court of Appeals has not seen fit to limit the all-inclusive scope of the statute as worded, it is clear that in the opinion of that

Court, the statute includes any type of annoyance where it is the result of the sending of a letter or postal card or similar writing.

What constitutes annoyance is not defined by the statute. Nor does the statute indicate that the annoyance contemplated is such as would disturb or irritate the average prudent person. Its phraseology is precisely the contrary. It is "intent to cause annoyance to any person" which forms the test of criminality. Such a test is purely personal, purely subjective and clearly will vary from case to case with the background, education, psychology and caprice of the individual to whom the letter is addressed. This is particularly important in the case at bar, since the District Attorney has contended that proof of the actual annoyance of the three recipients of the cards forming the basis of the convicted counts is evidence of petitioner's intent to cause annoyance upon the principle that an individual is presumed to be responsible for the natural consequence of his acts; and it was precisely upon evidence of such actual "annoyance" that the Trial Court convicted petitioner (R. 206-7; *infra* p. 25). The fact that in the cases of the acquitted counts the precise conduct and the precise cards did not cause annoyance, seems to be without significance in the view of the People, although we submit that it is of the utmost significance in considering whether the standard of conduct prescribed by the statute is a definite one and not violative of the Federal Constitution..

In *Lanzetta* v. *New Jersey*, 306 U. S. 451, this Court stated at page 453:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Construction Co., 269 U. S. 385, 391: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to

inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'"

In *Connally* v. *General Construction Co.*, 269 U. S. 385, this Court quoted with approval from the opinion in *United States* v. *Capital Traction Co.*, 34 App. D. C. 592, where a statute making it an offense for any street railway company to run an insufficient number of cars to accommodate passengers "without crowding" was held to be void for uncertainty. Said the Court (pp. 392-3):

"The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. * * * There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.

"* * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary per-

son can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

These cases are but typical of many in this Court which have held criminal statutes void, because they fixed no definite standards of conduct and attempted to prohibit acts where the test of criminality lay in the purely personal judgment of the jury or Court which might be trying any specific case. In other words, where the test of a crime is the subjective reaction of the triers of the fact as to whether a particular act constitutes a violation, the statute prohibiting such act is void.

United States v. *Cohen Grocery Co.*, 255 U. S. 81, 89;
Stromberg v. *California*, 283 U. S. 359, 369;
New State Ice Co. v. *Liebmann*, 250 U. S. 262, 279-280;
Herndon v. *Lowry*, 301 U. S. 242, 259-264;
Thornhill v. *Alabama*, 310 U. S. 88, 97-8;
Smith v. *Cahoon*, 283 U. S. 553, 564;
International Harvester Co. v. *Kentucky*, 234 U. S. 216, 221;
See also *Gorin* v. *United States*, 312 U. S. 19, 26-7, n. 12.

In the case at bar, petitioner had no evil purpose or wanton or malicious motive in carrying on his business of locating missing debtors. Hundreds, if not thousands, of other persons are engaged under license of the State of New York in the same calling. Petitioner performs his services for persons having unimpeachable right to the information sought—lawyers, finance corporations, department stores, etc. (R. 235). In tracing absconding

debtors, it is hardly to be expected that satisfactory results could be achieved from direct inquiry of those involved. It is obviously an essential part of any locating scheme to employ some form of deception to succeed in obtaining the desired information. It is clear, though, that the method employed caused little, if any, actual annoyance when it is remembered that the District Attorney having access to the thousands of files completed by the petitioner, found only seven to prosecute. Certainly a wanton or criminal intent to annoy would have manifested itself much more frequently and produced many more serious complaints than are evident in the record here. Petitioner obviously had no intent to annoy in sending out the cards. He was carrying on a lawful business of private detective in locating missing debtors. He personally knew none of the people contacted, had no personal malice towards them and had no motive to annoy them. We do not doubt that the legislature, by clear enactment, may limit the activities of private detectives. But it has not restricted the conduct of private detectives to the point of prohibiting them from using decoy letters and cards to obtain information.

The statute in question, in its application to petitioner in the case at bar, prevents him from carrying on a lawful occupation in a lawful manner by means long used. The statute has been applied to petitioner on the basis of a subjective standard of annoyance which petitioner could not possibly anticipate or determine in advance. It seems to be clear that the statute as applied in the case at bar is unconstitutional.

Conclusion

It is respectfully submitted that the Court of Appeals, by its judgment sought to be reviewed, has decided a federal question of substance not heretofore determined by this Court, to wit, the validity of Section 551 of the

Penal Law under the Federal Constitution, and has decided it in a way probably not in accord with applicable decisions of this Court in other cases involving a similar principle which we have cited above. The decision of the Court of Appeals upholds the validity of the State statute against the Constitution of the United States, and we submit does so erroneously.

It is, therefore, respectfully prayed that the petition for a writ of certiorari submitted herewith be granted, so that this Court may review the judgment of the Court of Appeals of the State of New York in said petition referred to.

Respectfully submitted,

SYDNEY J. SCHWARTZ,
Counsel for Petitioner.

Appendix

Oral Comments of Mr. Justice Wieboldt on Conviction (R. 206-7):

"Justice Wieboldt: No, not necessary, not with reference to the third, fourth and fifth counts. You renew the motions made at the close of People's case and further move for acquittal on the ground the defendant's guilt has not been proven beyond a reasonable doubt—is that right, Senator?

"Mr. Sheridan: Yes.

"Justice Wieboldt: That motion is denied by unanimous Court, with respect to the third and fourth counts and as to the sixth count, by majority of the Court, Justice Wieboldt dissenting as to the sixth count only.

"May I state further on behalf of the unanimous Bench that this finding of guilty of the defendant was based solely upon the testimony adduced with respect to the communications which were appended to the Information and that if the District Attorney had not introduced in evidence any of the additional exhibits which are now in evidence, which were received by a majority of the Court, that in spite of its being introduced, the decision of the Court is guilty, and that they so find regardless of the introduction of those exhibits or not; but of course those having been introduced, they had to be taken into consideration, but the Court is stating now that had they not been introduced and we had just relied upon the testimony adduced from these witnesses, together with those particular communications which were appended to the Information, that the Court feels that the defendant on that alone was guilty of committing the crime as charged, and, beyond a reasonable doubt."

(25)

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Supreme Court of the United States

October Term, 1944

No. 210

HARRY M. KOHN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1944

No. 210

HARRY M. KOHN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

Opinion Below

The petitioner was convicted of the crime of SENDING LETTERS WITH INTENT THEREBY TO CAUSE ANNOYANCE (Penal Law, § 551) in the Court of Special Sessions of the City of New York, New York County (WIEBOLDT, NORTHRUP and PAIGE, JJ.) (54-5, 617-8)[1]. There was no opinion handed down by the trial court.

The conviction was appealed by petitioner and was unanimously affirmed, with modification of sentence and without opinion, by the Appellate Division of the Supreme Court of the State of New York, First Department (266 App. Div. 995). On further appeal by the petitioner to the Court of Appeals of the State of New York, the judgment of conviction was unanimously affirmed, without opinion (292 N. Y. 597).

1. References are to folios in the printed record on appeal to Court of Appeals of the State of New York.

Jurisdiction

This being an application for a writ of certiorari (Petition, p. 1) and not an appeal, the jurisdiction of this Court must necessarily be invoked under section 237 (b) of the Judicial Code, as amended [28 U. S. C. A., § 344 (b)] —despite petitioner's reference to subdivision (a) of that section (Petition, p. 5; Petitioner's Brief, p. 13).

Statute Involved

The petitioner was convicted of a violation of the following provision of section 551 of the Penal Law of the State of New York:

> "* * * any person who shall knowingly send or deliver or shall make and for the purpose of being delivered or sent, shall part with the possession of any letter, postal card or writing with or without a name subscribed thereto or signed with a fictitious name or with any letter, mark or other designation, with intent thereby to cause annoyance to any person * * * is guilty of a misdemeanor."

Summary of Facts

The petitioner—operating a private detective agency—was engaged in locating debtors and collecting small claims. He devised a scheme whereby, at the cost of a postage stamp, he could compel persons having information as to the whereabouts of debtors to communicate with him simply to relieve the fear and anxiety induced by receipt of his vicious letters and cards.

Pursuant to this scheme the petitioner sent to any person who presumably knew where the debtor might be, a card or letter, a facsimile of which appears on page 3

of the Petition. It purported to come from an unnamed hospital, without a return address, and conveyed the impression that some relative or friend was hurt or ill. It stated, cryptically, "We are required to withhold identity of patient and institution". The recipient was urged to telephone "immediately". The given telephone number was the petitioner's unpublished number about which the telephone company could not give information.

When the shocked and frightened recipient telephoned, the petitioner pretended to be "Dr. Winch", or "Dr. Gordon" or "Dr. Burell" (96, 249-50, 316), and, continuing the deception, he extracted information as to the whereabouts of the debtor he was trying to locate.

The whole scheme was conceded by the petitioner to be a "ruse," and the cards were admittedly an essential device in the deceit and subterfuge practiced by him (186, 196). They were sent indiscriminately not only to debtors who were being sought, but to innocent dupes, unconnected save by mere acquaintance or relationship with the debtor.

Question Presented

The petitioner claims that the statute is unconstitutional, as repugnant to the Fourteenth Amendment to the Constitution of the United States, in that: (1) it is too vague and indefinite; and (2) it exceeds the police power of the State (Petition, p. 9).

It is the respondent's position: (1) that no constitutional or federal question was raised or drawn in the State courts; and (2) that the alleged constitutional question which the petitioner now seeks to raise is wholly without merit.

I

The constitutionality of the State statute was not drawn in question or presented for decision in the State courts, nor did they pass, expressly or by inference, on any such question.

No constitutional question was presented to the State courts, either at the trial of the case before the Court of Special Sessions of the City of New York or upon appeal to the Court of Appeals. It follows that this Court will not assume jurisdiction. [*Memphis Nat. Gas Co.* v. *Beeler* (1942) 315 U. S. 649; *Minnesota* v. *National Tea Co.* (1940) 309 U. S. 551; *Patterson* v. *Stanolind Oil & Gas Co.* (1939) 305 U. S. 376; *Honeyman* v. *Hanan* (1937) 300 U. S. 14; *Lynch* v. *People of New York ex rel. Pierson* (1934) 293 U. S. 52; *Southern Pac. Co.* v. *Arizona* (1919) 249 U. S. 472; *Montana ex rel. Haire* v. *Rice* (1907) 204 U. S. 291.]

A. No constitutional question was presented at the trial of the case

The petitioner seeks to convey the impression that he succeeded in presenting a constitutional question to the trial court by means of a motion to dismiss and by various objections to the evidence (Petition, pp. 4 and 5).

Such is not the fact. The motion to dismiss was extensively argued at the Bar, covering forty-one folios in the printed record, but no question as to the constitutionality of the statute (Penal Law, § 551) was suggested by counsel for the defendant (580-621). And, though the petitioner made objection to certain lines of testimony on the ground that it was without proper foundation or irrelevant to the issues, he made no effort to raise or even suggest a constitutional question, as he now attempts to do, in relation to the admission of such evidence.

B. No constitutional question was presented to or necessarily decided by the Court of Appeals

A mere reading of that portion of the petitioner's Court of Appeals brief cited at pages 6 to 8 of his Petition is sufficient to demonstrate that no constitutional question was necessarily presented thereby to the Court. The petitioner merely argued there that (Petition, p. 6): "*Unless* the statute is reasonably construed so as to exclude from its ambit the necessary and incidental annoyance in the carrying on of a lawful business * * * it would clearly be unconstitutional"; that "the same would be true *if* the test of what constitutes annoyance is the subjective reaction of the recipients of the cards * * *." (Italics supplied.) Thus, he summarized his argument (Petition, p. 8): "We contend that a construction which makes the test of intent to annoy the subjective reaction of the recipients of the cards destroys the degree of definiteness required of criminal statutes by the Federal Constitution."

The facts of the case, however, did not call for the suggested unconstitutional construction. Furthermore, the People, in opposing the appeal, did not advance any such interpretation or application of the law: the petitioner's guilt was sufficiently grounded on a very different theory of the scope and meaning of the statute. Thus, the People took the position that it was the petitioner's clear design and intent, as demonstrated by his planned course of conduct and the results he sought to achieve, to cause annoyance to the recipients of his letters. Such proof, the People argued, was ample to support the conviction, entirely apart from evidence of the "subjective reaction of the recipients" which was merely corroborative of the petitioner's design (Respondent's Brief in the Court of Appeals, pp. 9-15).

Nor was it necessary for the Court of Appeals to determine whether the statute could constitutionally be extended to cover a case of "necessary and incidental annoyances" in ordinary social or business intercourse. The validity of the statute was not exposed to question by reason of such a construction for the obvious reason that neither the facts of the case nor the argument of the People required any such construction.

The record, therefore, provides no reason for accepting the petitioner's strained hypothesis that the Court of Appeals must necessarily have construed the statute in the allegedly unconstitutional manner suggested by him. In truth, the constitutional question now urged was not actually decided by the Court of Appeals and the judgment rendered by that Court did not require decision on any such question.

It follows that this Court will not now assume jurisdiction of such question [See *Southwestern Bell Telephone Co.* v. *Oklahoma* (1938) 303 U. S. 206]. In the case cited, this Court observed (303 U. S. at pp. 212, 213):

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U. S. 293, 295, 297; *Whitney* v. *California*, 274 U. S. 357, 360, 361; *Lynch* v. *New York*, 293 U. S. 52, 54."

II

The statute is specific and definite and as applied to the activity of petitioner is a reasonable and proper exercise of the State's police power.

A. The statute is not vague and indefinite

The statute in question (Penal Law, § 551) uses words of common and clear import to define the conduct penalized. There is nothing complex or obtuse either in the words or the grammar. So far as it relates to the instant case, it provides simply and clearly that "any person who shall knowingly send * * * any letter, postal card or writing * * * signed with a fictitious name * * * with intent thereby to cause annoyance to any person * * * is guilty of a misdemeanor."

So simple and plain is the statute that analysis of its terms is unnecessary. It is, patently, "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." [See *Kay* v. *United States* (1938) 303 U. S. 1, 9; *Connally* v. *General Const. Co.* (1926) 269 U. S. 385, 391.] No man of common intelligence need guess at its meaning. The conduct penalized is "not beyond the ready comprehension either of persons affected by the act or of juries called upon to determine violations" [*United States* v. *Ragen* (1942) 314 U. S. 513, 524].

Petitioner's suggestion that "annoyance" as used in the statute is a word of unreasonable scope so vague and indefinite that it could encompass any slight disturbance of a tranquil mind is, obviously, not a corollary of the judgment convicting him. Beyond that, the suggestion is contrary to the construction of the statute by one State court which defined the term as "real annoyance and disturbance in the mind of the person affected," not "whimsical or capricious" or "trivial". [See *People* v. *Mikulski* (Mag. Ct. N. Y. C. 1914) 146 N. Y. Supp. 829, 833.] Only

when such annoyance is intended does the statute apply—as in the instant case where the petitioner caused his victims gnawing fear and anxiety, and even shock (419, 539). Therefore, "If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness." [*Fox* v. *Washington* (1915) 236 U. S. 273, 277.]

B. The statute, as applied to the petitioner's conduct, is clearly within the police power of the State of New York [2]

At the outset, it may be observed that—unless the statute is clearly unconstitutional no matter what construction be given its terminology—the petitioner is confined to attacking its validity *as applied to his activities as disclosed by the record;* he is not entitled to the benefit of any fanciful construction which might conceivably render the statute invalid. [*Fox* v. *Washington* (1915) 236 U. S. 273, 277; *Baender* v. *Barnett* (1921) 255 U. S. 224, 225-226; *United States* v. *Kirby* (1868) 74 U. S. 482, 486.] As was observed in *Fox* v. *Washington, supra,* 236 U. S. 273, 277:

> "So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; * * * and it is to be presumed that state laws will be construed in that way by the state courts."

Under the rule thus enunciated, there can be no conceivable doubt of the validity of the statute. As appears from the Summary of Facts, *supra,* pp. 2-3, it is apparent that the petitioner's actions were so vicious as

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2. It is to be noted that the petitioner makes no claim that the statute (Penal Law, § 551) infringes any constitutionally guaranteed freedom. The contention is simply that the legislation "does not fall within any of the well-recognized fields for exercise of the police power" (Petitioner's Brief, p. 17).

positively to cry out for the intervention of the State's police power. He deliberately and wantonly destroyed the peace of mind and imperiled the mental and physical health of innocent persons, who can look only to the State for protection unless they themselves are to take action which will lead to disturbance of the public peace.

No authority is cited by the petitioner which remotely suggests that conduct such as his is beyond the power of the State to prevent. On the contrary, the decisions of this Court firmly support the State's exercise of its police power to punish such reprehensible activity. [*Cf. Chaplinski* v. *New Hampshire* (1942) 315 U. S. 568; *Thornhill* v. *Alabama* (1940) 310 U. S. 88; *Gitlow* v. *New York* (1925) 268 U. S. 652; *Omacchevarria* v. *Idaho* (1918) 246 U. S. 343; *Barbier* v. *Connolly* (1885) 113 U. S. 27.]

The petitioner's suggestion (Brief, pp. 16-17) that New York alone has the particular form of statute now under consideration presents, of course, no legitimate ground of attack. The fact is, however, that analogous statutes have been enacted in other states. [*Cf.* Michigan Comp. Laws (1929) § 16814; Maine Rev. Stat. (1930) Ch. 129, § 22, p. 1549.]

III

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel.

August, 1944.